



May 22, 2009

Mr. Edward S. Karl, Director
AICPA Tax Division
1455 Pennsylvania Avenue NW
Washington, D.C. 20004-1081

Re: Statements on Standards for Tax Service (SSTS), Exposure Draft (November 2008)

Dear Mr. Karl:

We appreciate the opportunity to comment on the AICPA's Exposure Draft of Proposed Statements on Standards for Tax Services. Briggs & Veselka Co. is a public accounting firm located in Bellaire (Houston), Texas. We employ approximately 150 people and prepare about 5,000 individual, partnership, corporate, trust, and nonprofit tax returns each year.

We have read and evaluated the Exposure Draft and respectfully submit the following comments.

Proposed Statement on Standards for Tax Services No. 6, Knowledge of Error: Return Preparation and Administrative Proceedings

SSTS No. 6 discusses a member's duty to inform a taxpayer about errors and the failure to file a required return. Paragraph 4 of the exposure draft requires a member to inform the taxpayer promptly upon becoming aware of an error on a previously filed return, an error in a return that is the subject of an administrative proceeding, or of a taxpayer's failure to file a required return. It requires the member to advise the taxpayer of the potential consequences of the error and recommend the corrective measures to be taken. We agree with this requirement.

Paragraph 1 defines "error" to include any position, omission, or method of accounting that, at the time the return is filed, fails to meet the standards set out in Statement on Standards for Tax Services (SSTS) No. 1. *Tax Return Positions*. We also agree with this definition.

However, Paragraph 1 further defines *error* to include positions on a prior year return that are rendered incorrect by subsequent legislation, judicial decisions, or administrative pronouncements. It reads as follows:

“The term *error* also includes a position taken on a prior year’s return that no longer meets these standards due to legislation, judicial decisions, or administrative pronouncements having *retroactive* effect.” [emphasis supplied]

We strongly disagree that errors should include positions on prior returns that were proper at the time the return was filed, but may be affected by subsequent legislation, judicial decisions, or administrative pronouncements. This definition of error goes far beyond what we believe members should be required to do or may even be capable of doing.

We do not believe that members should have a duty to monitor how all future statutes, court cases, regulations, and rulings affect returns that have already been filed and that were proper at the time they were filed. This would require systems and resources beyond what is available or affordable to most members. This requirement also reaches far beyond any requirements found in IRC Section 6694 or Circular 230, Regulation 10.21 (see attached).

Retroactivity is often unclear

To determine whether an error was committed on a prior return, the member would need to conclude that the statute, case, or ruling has retroactive effect. This is often unclear for many reasons. First, court cases are generally not retroactive because they apply only to the specific parties, years, and facts before the court. Even if the court’s decision could be transformed into a broad principle of law, the member would have to examine the workpaper files of each client that may be affected in order to determine if the holding renders the prior position incorrect. We believe that this is unreasonably burdensome. It is also a trap for the unwary if the member overlooks an error on a prior year return that was proper at the time it was filed.

Retroactivity may also call for a legal conclusion

While regulations generally contain an expressly stated effective date, court cases and rulings do not. Thus, whether a legal principle announced in a court case or ruling affects the validity of a transaction that occurred in a prior year is a matter of law. Members should not be required to seek a legal opinion every time a judicial decision or administrative pronouncement is published.

Court cases may be overturned on appeal

Many court cases are appealed and therefore it is not clear whether the lower court decision affects the prior year position until the matter has been fully adjudicated. This raises the question of at what point in the judicial system should members determine that a case has clear retroactive effect. As a matter of law, cases are only binding when the last court has rendered its opinion.

Underlying data may not be available

It is often not clear whether the client has taken an incorrect position if the substantiation required to meet the new standard was not gathered at the time the original return was prepared, but could have been, had the taxpayer known of the new rule of law. Further, the subsequent statute, court case, or ruling may merely cast doubt on a prior position rather than render it clearly incorrect. Because different substantiation was required at the time the return was originally filed, the member may not have the data in their working paper files to determine whether the position was in error or not unless he requests it from his client. Should the member inquire of every client for all open years whether they can now properly substantiate all prior year positions based on a different rule of law? We believe not.

The following example illustrates the difficulty of defining error to include positions taken on prior returns that were correct at the time, but may now be incorrect due to subsequent legislation, judicial decisions, or administrative pronouncements having a retroactive effect.

Example: Bob Jones owns a small CPA practice and prepares about 1,000 tax returns each year. In 2007, he deducted investment management fees paid by his trust clients based on the 6th Circuit's interpretation of IRC Section 67(e) in *O'Neill v. Commissioner*. This was substantial authority at the time the returns were filed. However, in 2008 the U.S. Supreme Court in *Knight v. Commissioner* held that Section 67(e) had a different meaning than the one ascribed to it in *O'Neill*. The Supreme Court's decision cast doubt on whether investment management fees should have been fully deducted on 300 trust returns that Bob prepared in 2006, 2007, and 2008. Without investigating the facts in all 300 cases, Bob cannot be sure whether any or all of the previously filed returns contain an error. In addition, many of these trust returns affect hundreds of beneficiaries who received distributions. What is Bob required to do?

Based on SSTS No. 6, Bob must first determine whether the decision in *Knight* has retroactive effect on his trust and individual clients. This is not clear. In addition, he must review the files of all his trust clients and determine whether the underlying data exists to support the deduction based on *Knight*. Further, he may need to ask his clients to gather additional facts to support the new meaning of Section 67(e) found by the Court. He must do this for 2006, 2007, and 2008. Based on the new facts, Bob must decide whether to recommend that his clients take corrective action.

Recommendation

To correct this impractical and burdensome situation, we recommend that *error* include only a position, omission, or method of accounting that, at the time the return is filed, fails to meet the standards set out in Statement on Standards for Tax Services (SSTS) No. 1. *Tax Return Positions*. This it would not include a position taken on a prior year's return that no longer meets these standards due to legislation, judicial decisions, or administrative pronouncements having *retroactive* effect. To accomplish this, we

recommend that the third sentence in Paragraph 1 of SSTS No. 6 be deleted altogether. This would align the SSTS with the requirements found in Regulation 10.21 of Circular 230 (attached).

Alternatively, if the Tax Executive Committee believes that retroactive legislation, judicial decisions, and administrative pronouncements pose a great risk to the members and the public, we recommend that the definition of error based on retroactivity be changed to include only situations where the member *has knowledge* that an error was in fact made and where the subsequent legislation, judicial decision, or administrative pronouncement is *clearly* retroactive. Clear retroactivity would exist, for example, when the statute, judicial decision, administrative pronouncement, or applicable governing body expressly announces an effective date that is prior to the time the return was filed. As such, the definition would read:

“The term error also includes a position taken on a prior year’s return that the practitioner *knows* no longer meets these standards due to legislation, judicial decisions, or administrative pronouncements that are made *clearly and expressly* retroactive by the governing body.”

The above modification to the definition of error raises the threshold from “awareness” to “knowledge” and applies only in cases where the subsequent law is clearly retroactive. Thus, it places a duty on the member to advise his clients of a retroactive law change only if he or she *knows* that the prior year return was incorrect based on facts that he or she has available at the time and only where the law is made clearly and expressly retroactive by the legislature, administration, or court. Thus, where the retroactive effect of a law is uncertain or the degree of accuracy of a prior return position is not clear, the practitioner has no duty to investigate the facts and the law further, or to recommend that the client take corrective action.

In short, the practitioner is not required to monitor the effect of subsequent developments on each and every prior year return he or she has correctly prepared over the last several years, including those of partners, S corporation shareholders, and beneficiaries of passthrough entities that may be affected.

We thank you for the opportunity to provide our input on these very important Statements on Standards for Tax Services, which greatly impact our clients. If you would like to discuss it further, please contact me at 713-667-9147.

Very truly yours,



Carol A. Cantrell, Shareholder
Briggs & Veselka Co.

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Final, Temporary & Proposed Regulations

Circular 230

Reg §10.21 [Circular 230] Knowledge of client's omission.

Federal Regulations

Reg §10.21. [Circular 230] Knowledge of client's omission.

A practitioner who, having been retained by a client with respect to a matter administered by the Internal Revenue Service, knows that the client has not complied with the revenue laws of the United States or has made an error in or omission from any return, document, affidavit, or other paper which the client submitted or executed under the revenue laws of the United States, must advise the client promptly of the fact of such noncompliance, error, or omission. The practitioner must advise the client of the consequences as provided under the Code and regulations of such noncompliance, error, or omission.

[35 F.R. 13205, Aug. 19, 1970, as amended at 42 F.R. 38350, July 28, 1977; 57 F.R. 41095, Sept. 9, 1992]; T.D. 9011, 7/25/2002 .
